United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1217 P PAS

To be argued by:

GEORGE SHEINBERG, ESQ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA

Appellee

-against-

Docket No. 75-1217

WILLIAM CRUZ

Appellant

----------X

On Appeal from the United States District Court
For the Eastern District of New York

APPELLANT'S BRIEF

Attorney for Appellant
GEORGE SHEINBERG
ATTORNEY AT LAW
66 COURT STREET
BROOKLYN, N. Y. 11201

ULSTER 2-6282

To be argued by:

GEORGE SHEINBERG, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA

Appellee

Docket No. 75-1217

-against-

WILLIAM CRUZ

Appellant

----------X

On Appeal from the United States District Court
For the Eastern District of New York

APPELLANT'S BRIEF

GEORGE SHEINBERG
Attorney for Appellant
60 Court Street
Brooklyn, New York 11201

ULster 2-8282

INDEX

TABLE OF CASES

STATEMENT

This is an appeal by the defendant, WILLIAM CRUZ, from a judgment of conviction of the crimes of possession with intent to distribute and the sale of a certain quantity of a controlled substance, in that on February 19, 1974, the appellant possessed and sold four ounces of cocaine hydrocloride. Judgment was rendered on April 25, 1975, after trial without a jury by HON. ORRIN G. JUDD, U.S.D.J. at the United States District Court for the Eastern District of New York.

It is the contention of the appellant that the evidence did not prove him guilty beyond a reasonable doubt, the Court erred in permitting evidence of prior similar acts, and that the verdict finding the defendant guilty but finding the co-defendant, DOMINGO QUINONES, not guilty was inconsistent and should be reversed.

SUMMARY OF PROOF

Detective WILLIAM McGROATY, of the New York Drug Enforcement Administration Task Force, testified that prior to February 19, 1974, he had been introduced to one RONALD RICHARDS as a dealer in drugs and that he had purchased four ounces of cocaine from RICHARDS on February 7, 1974. On February 14, 1974, McGROATY attempted to purchase eight ounces of cocaine from RICHARDS. RICHARDS informed him that he would be able to sell him the cocaine several days later. On February 17, 1974, RICHARDS informed McGROATY that he could deliver the cocaine on February 19, 1974. On that date, McGROATY in the company of Police Officer POSTER went to RICHARDS' home at 999 Bushwick Avenue, Brooklyn, at 6:40 P.M. RICHARDS met them at the door but told them that there would be a slight delay in

delivery. He told them to leave and come back in ten minutes. He would have to go out and make arrangements for delivery. McGROATY and POSTER left. They returned at 7:20 P.M. RICHARDS met them at the door and took them to his second floor apartment. He told them that he had made arrangements for delivery at 8:15 P.M. and that they should wait at his apartment until the delivery. At 8:15 P.M. a buzzer rang and RICHARDS left the room. McGROATY heard footsteps and conversation. Five minutes later he returned carrying two plastic bags containing a white powder. The sale was then completed.

Upon cross examination, McGROATY testified that RICHARDS had stated that his sources were Italian, that the cocaine purchased on February 19, 1974 was from a new source of supply.

Investigator MERCER testified that he was on surveillance outside the premises of 999 Bushwick Avenue on February 19, 1974, and that he observed McGROATY and POSTER enter the premises at 6:40 P.M. and leave at 6:45 P.M. He then observed a male leave the premises at 6:50 P.M. and enter a light color Plymouth which was driven away. The vehicle returned at 7:10 P.M. and the male returned to the premises. MERCER identified the male as RICHARDS. He then observed McGROATY and POSTER return to the premises at 7:20 P.M. At 7:25 P.M. he observed a blue 1973 Ford drive up and park behind the Plymouth. Two men exited and entered the premises. The registration of the vehicle was checked and it was found to be registered to the defendant, WILLIAM CRUZ. At 8:40 P.M. the two men left the premises and drove off in the Ford. MERCER followed the car to Palmetto Street near Myrtle Avenue, where the car parked at a bus stop. MERCER observed the occupants exit the car and walk within several feet of Detective CABAN.

Detective CABAN testified that he followed the Ford to Palmetto Street and saw it park opposite 385 Palmetto Street, CABAN parked next to 385 Palmetto Street. He exited his car and observed the occupants of the Ford exit the car and walk across the street. They passed about two feet from CABAN. CABAN identified the occupants of the Ford as the defendants.

RICHARDS testified that he began to purchase cocaine from the defendant QUINONES in December, 1973. At that time QUINONES had given RICHARDS his business card with his business and home telephone numbers written on the back. In January, 1974, QUINONES introduced the defendant CRUZ to RICHARDS as his "compare". CRUZ exchanged four ounces of cocaine for ten pounds of marijuana. CRUZ then gave RICHARDS his telephone number. On February 7, 1974, RICHARDS called CRUZ and purchased two ounces of pure cocaine from CRUZ and QUINONES which he diluted to five ounces, four of which were sold to McGROATY that day. When McGROATY called RICHARDS on February 14, 1974 asking for eight ounces of cocaine, RICHARDS called CRUZ who promised delivery in a couple of days. RICHARDS then arranged the sale for February 19, 1974. McGROATY arrived at 5:30 P.M. and CRUZ and QUINONES arrived at 6:00 P.M. RICHARDS never left the house and the sale was completed at that time.

On cross examination, RICHARDS testified that although he had five to eight suppliers, and that he had agreed to cooperate with the Government, he only named CRUZ and QUINONES. He admitted having an associate named LOUIS who lived at 385 Palmetto Street, with whom he left narcotics and who stole his narcotics after his arrest. Despite his initial claim that he never left cocaine with LOUIS, he later admitted that he had left cocaine with LOUIS.

Detective CASTRO testified that while acting as an undercover agent, he had made three purchases of cocaine from CRUZ. These purchases were made at CRUZ's apartment at 24 Furman Avenue, although they had once gone to 140 Sunnyside Avenue where QUINONES' in-laws lived.

The Government then rested.

Patrolman LE MOINE testified that he was part of the surveillance team on February 19, 1974, and that he was informed that RICHARDS had left 999 Bushwick Avenue in a yellow Plymouth sedan and that the sedan was followed to Palmetto Street where it was lost in traffic.

QUINONES testified that he knew CRUZ as as a fellow-worker in his in-laws' business. CRUZ had taken him to RICHARDS' home to buy an ounce of marijuana. RICHARDS was angry that CRUZ had not called before coming, stated that he was busy-and told CRUZ and QUINONES to see LOUIS at 385 Palmetto Street. CRUZ and QUINONES remained at the basement apartment with HARRY JAMES, half brother of RICHARDS, until 8:45 P.M. when they left to go to 385 Palmetto Street. LOUIS was not there so CRUZ drove him home.

The defense then rested.

The Court found QUINONES not guilty but found CRUZ guilty on both counts. CRUZ was later sentenced to 10 years concurrent on each count, a five year special parole and a $5,000.00 fine.

POINT I

THE GOVERNMENT DID NOT PROVE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT

Appellant's guilt was in large part attributable to the testimony of RICHARDS. This testimony is on its face riddled with inconsistencies. RICHARDS claimed that he had five to eight suppliers. Yet he could name only CRUZ and QUINONES. He claimed that his supplier was Italian. Neither of the defendants were Italian. He claimed not to have any supply of cocaine. Yet he admitted that he kept cocaine at LOUIS' home at 385 Palmetto Street. He claimed that he never left the house on February 19, 1974. Yet, this is clearly contradicted by the testimony of the police. His testimony at the trial was in marked contradiction with his prior testimony at the Grand Jury and at the previous trial.

The only corroboration of RICHARDS' testimony is the presence of the defendants at his home. This corroboration was not deemed sufficient in the case of QUINONES but was deemed sufficient as to CRUZ. This distinction was created by the testimony of CASTRO as to prior similar acts. But these similar acts must not be construed to prove the propensity of CRUZ to have committed the acts in question. This issue will be treated in more detail in Point II.

In fact, it is more likely that QUINONES' explanation of their presence is the truth. Why did RICHARDS go to Palmetto Street? Why did the defendants go to Palmetto Street after leaving RICHARDS' home? The only reasonable explanation is that RICHARDS went to pick up the cocaine at LOUIS' home and that he sent the

defendants there to purchase marijuana, not because he did not keep marijuana at his home, but because he did not want to interrupt his sale to McGROATY. There was no attempt by the Government to account for RICHARDS' or defendants' trip to Palmetto Street where LOUIS, the associate of RICHARDS, resided.

Without the evidence of prior similar acts by CRUZ there is no corroboration of RICHARDS' testimony. In fact, this is what the Court found in finding QUINONES not guilty. It is submitted that these prior similar acts may not be used to infer that because CRUZ committed these acts in the past, he is guilty of the acts charged. Absent these prior similar acts, there is more than a reasonable doubt that the defendant CRUZ committed the acts charged.

POINT II

THE PROBATIVE VALUE OF PRIOR SIMILAR ACTS BY CRUZ WAS FAR OUTWEIGHED BY ITS PREJUDICIAL EFFECT

The general rule in the Second Circuit is that evidence of prior similar acts is admissable into evidence unless it is offered solely for the purpose of proving criminal propensity. United States v. Deaton, 381 F.2d 177 (2nd Cir., 1967). This inclusionary rule has been adopted by Rule 404 of the Federal Rules of Evidence.

However, evidence of such acts must be offered to prove a fact that is substantially at issue. Examples of such issues are intent, an element of the crime, identity, a system of criminal activity, the character of the defendant if the defendant has placed his character at issue, and the credibility of the defendant if the defendant has testified. Spencer v. State of Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed. 2d 606 (1967).

The character of the defendant is not in issue. He offered no character witnesses. His credibility is not in issue since he did not testify. There is no allegation of mistake or accident so that intent would be at issue. There is no element of the crime for which the prior acts are offered. There is no question of the identity of the defendant. Therefore, the only possible issue is to show a system of criminal activity.

Yet, the system of criminal activity alleged by the testimony of CASTRO reveals that sales were made at the apartment of the defendant CRUZ. In each case, the defendant CRUZ insisted upon being called in advance and the sale taking place at his apartment. Thus, the system of criminal activity is different in all respects except for the bare fact of a sale of cocaine.

In fact, the system of criminal activity belies the claimed transaction. RICHARDS alleges that CRUZ asked for marijuana in exchange for cocaine. RICHARDS admits keeping marijuana at the apartment. QUINONES testified that he wanted to purchase marijuana. After being refused by RICHARDS, they drove to the home of LOUIS who kept marijuana for RICHARDS. If RICHARDS wanted the cocaine delivered, why did he drive to Palmetto Street? Why did RICHARDS deny that he left the house when this is contradicted by all other testimony? Thus, the evidence of a system of criminal activity has little probative value except to establish that the defendant CRUZ has sold cocaine.

On the other hand, such evidence has the highly prejudicial effect or inferring that if he has committed such crimes in the past, he has the propensity to commit the crimes charged. This is the very type of prejudicial evidence which is prohibited by Deaton. This type of evidence becomes highly prejudicial when the prior criminal

activity is the very same type as the crime charged.

The prejudicial effect of this evidence can be seen in the opinion of the Court whereby QUINONES was found not guilty in the absence of such prejudicial evidence while CRUZ was found guilty, on the ground that the prior similar acts corroborated the testimony of RICHARDS as to CRUZ. Thus, CRUZ was convicted for being a dealer in cocaine, NOT for selling cocaine on this particular occasion. If this were not the case, QUINONES would have been found guilty as well as CRUZ.

POINT III

THE VERDICTS AS TO CRUZ AND QUINONES ARE INCONSISTENT

The general rule is that inconsistent verdicts are not invalid. United States v. Dunn, 284 U.S. 390. The rationale for this rule is that a jury may mistakenly usurp the executive authority to exercise leniency. However, such a rationale does not apply where a trial is held without a jury. This circuit has taken a strong position against inconsistent verdicts in non-jury cases. United States v. Maybury, 274 F.2d 899 (2nd Cir., 1960). As Judge Friendly stated in that case:

> "we do not believe we would enhance respect for law or for the courts by recognizing for a judge that same right to indulge in 'vargaries' in the disposition of criminal charges that, for historic reasons, has been granted the jury." Id at 903

This verdict is inconsistent as to the two defendants. The testimony of RICHARDS alleges that CRUZ and QUINONES were partners. CRUZ was introduced as the "compadre" of QUINONES. It was QUINONES who allegedly sold cocaine to RICHARDS in December, 1973, before RICHARDS even knew of CRUZ. CASTRO testified that on one occasion, CRUZ first drove to the home of QUINONES' in-laws

before completing a sale. QUINONES came to RICHARDS' home with CRUZ. QUINONES testified that CRUZ was never out of his sight. Thus, if a sale took place, QUINONES and CRUZ must have been acting in concert. To find one guilty and one not guilty is the height of inconsistency.

While this inconsistency might be regarded as leniency by a jury, it can only be regarded as error by a court acting without a jury. The standard enunciated by this Court in United States v. Maybury should be upheld and the conviction reversed as being inconsistent.

CONCLUSION

THE JUDGMENT OF CONVICTION OF THE APPELLANT SHOULD BE REVERSED.

Respectfully submitted,

GEORGE SHEINBERG
Attorney for Appellant
66 Court Street
Brooklyn, New York 11201